

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:)	CHAPTER 7
)	
MARK A. CONNER,)	CASE NO. 11-50818 - MHM
)	
Debtor.)	

SUN NURSERIES, INC.,)	
)	
Movant,)	
v.)	CONTESTED MATTER
)	
MARK A. CONNER,)	
)	
Respondent.)	

**ORDER GRANTING MOTION FOR RELIEF FROM STAY
AND EXTENSION OF TIME TO FILE §523 and §727 COMPLAINT**

On April 27, 2011, Sun Nurseries, Inc. ("Movant") filed a *Motion to Modify the Automatic Stay to Authorize Movant to Continue Appeal to the Georgia Court of Appeals* (Doc. No. 49) and a *Motion for Extension of Time to File Complaint Pursuant to 11 U.S.C. §523 and/or §727* April 1, 2011 (Doc. No. 41) (collectively, the "Motions"). Debtor filed written objections to both Motions (Doc. Nos. 51, 53 and 54). Hearing was held May 17, 2011. The parties filed post-hearing briefs (Doc. Nos. 59 and 61).

Debtor is a co-defendant in a civil action filed by Movant in Henry County Superior Court for breach of contract, fraud, conversion (the "Litigation"). On June 3, 2010, the Henry County Court, following presentation of Plaintiff's case at trial, directed a verdict in favor of Debtor and the other individual defendants (the "DV Judgment").

Initially, Movant appealed the DV Judgment within 30 days after it was entered, but then Movant dismissed the appeal because Movant believed the appeal was filed prematurely (the “First Appeal”). Thereafter, on June 17, 2011, the Henry County Court entered judgment on the jury verdict rendered against other defendants in the Litigation (the “JV Judgment”). On February 15, 2011, the Henry County Court entered an order ruling on motions regarding attorneys fees filed by Movant and by the individual defendants (the “Attorneys Fees Order”). On March 15, 2011, Movant filed a notice of appeal of the DV Judgment, the JV Judgment, and the Attorneys Fees Order (the “Second Appeal”).

Debtor asserts that Movant’s Second Appeal is untimely, thus rendering the DV Judgment a final judgment holding Movant has no claim against Debtor. If Movant has no claim against Debtor, then modification of the automatic stay to allow the appeal to go forward as to Debtor is unnecessary and Movant lacks standing to seek an extension of time to file a complaint to object to Debtor’s discharge or to determine dischargeability. Movant, however, contends its Second Appeal is timely filed and so holds a contingent claim against Debtor.

Neither party presented substantial case law regarding the timeliness of Movant’s Second Appeal and the statutory law does not clearly answer the question regarding appeals involving multiple defendants and judgments entered at different times. In the case of *Culwell v. Lomas & Nettleton Co.*, 242 Ga. 242, 248 S.E. 2d 641 (1978), the court held that, in a lawsuit with multiple defendants, when one party obtains judgment against another party, it is not a final judgment unless the trial court makes express direction for

entry of final judgment and determines that no just reason for delaying finality of judgment exists. It does not appear that the DV Judgment contains such a determination that would have rendered it a final, appealable judgment. On the other hand, however, in the case of *O'Leary v. Whitehall Construction*, 288 Ga. 790, 708 S.E. 2d 353 (2011), the court held that a post-judgment motion for attorneys fees does not toll the 30 days time limit for appeals. As part of the Attorneys Fees Order addressed attorneys fees awarded in connection with the JV Judgment, it is unclear when the 30-day appeal time began.

The viability of Movant's appeal of the DV Judgment is a matter of state law and the parties have not cited statutory or case law that clearly determines an issue regarding the Georgia Court of Appeals' jurisdiction. Also, the timeliness of the Second Appeal seems to be an issue that could be decided by the Georgia Court of Appeals relatively quickly. On the other hand, refusal to modify the stay to allow the appeal to move forward and refusal to grant a reasonable extension of time for Movant to investigate a possible claim for relief under 11 U.S.C. §727 or §523 could irrevocably deprive Movant of any right to relief against Debtor in the bankruptcy forum.¹ Accordingly, it is hereby

ORDERED that Movant's motion for relief from stay is *granted*; provided, however, that Movant is directed to immediately proceed to seek a determination regarding the timeliness of the pending appeal. It is further

¹ As the holder of an arguably contingent claim, Movant would have standing to file such a complaint, subject to dismissal if the Georgia Court of Appeals determines the Second Appeal was untimely filed.

ORDERED that Movant's motion to extend the time to file a complaint under 11 U.S.C. §523 and/or §727 is ***granted:*** time is extended to December 29, 2011.

The Clerk, U.S. Bankruptcy Court, is directed to serve a copy of this order upon Debtor, Debtor's attorney, attorney for Sun nurseries, Inc., the U.S. Trustee and the Chapter 7 Trustee.

IT IS SO ORDERED, this the 29th day of September, 2011.



MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE